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Pleading Written Instruments in Chancery Bills

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PLEADING WRITTEN INSTRUMENTS IN CHANCERY BILLS

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I.

In General

THE growing complexity of the provisions of the modern trust deed, combined with the great number of notes or bonds with interest coupons thereto attached, often secured by a single trust deed, makes this subject an important one to the solicitor who is called on to foreclose. He must sufficiently plead in his bill of complaint the written documents on which it is based to secure to his client the full benefit thereof. On the other hand, practical considerations, as well as the frequent desirability of haste in instituting suit, which means haste in drafting the bill, forbid that he do more than is necessary from the standpoint of safety. The present day practitioner occupies a far different economic position as to the disposition of his time and that of his office assistants than did his professional forefathers. With this situation in view, and with special reference to the practice in the State of Illinois, a common law jurisdiction, where no statute or local rule of court applies, this subject is now considered. It is obvious that there are but four ways in which documents can be pleaded in bills in chancery, viz: in *haec verba;* in substance only; in substance only with an exact copy thereof attached to the bill as an exhibit and thereby made a part thereof; and in substance only and by apt reference thereto the document itself made a part thereof.

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II.

In Haec Verba

That the practice in the English courts of Chancery at an early date was to set forth all writtten documents in full where the same were relied upon and even probably in instances where the document itself was not material to complainant's case, is evidenced by the rules that were early adopted to correct this abuse. The ordinance of Lord Bacon against impertinence was doubtless directed in part at least against this practice. He declared that both the party and the counsel under whose hand pleading of immoderate length had passed, should be fined. Lord Keeper Coventry, with the advice of Sir Julius Caesar, the Master of the Rolls, in the year A. D. 1635, ordained that bills, answers and other chancery pleadings "should not be stuffed with the repetitions of deeds or writings in *haec verba,* but the effect and substance of so much of them only as was pertinent and material to be set down, and that in brief and effectual terms, etc., and upon any default therein, the party and counsel under whose hand it passed, should pay the charge of the copy and be further punished as the case should merit."

The same rule was re-enacted by the Lords Commissioners in the year A.D. 1649 and in Lord Clarendon's Digest or System of Rules (Vane's Orders 2569 and 165) and that these rules were not entirely effective, at least in the American Colonies we can infer from the fact that in the year A.D., 1727, the Governor of the Colony of New York, exercising in Council the powers of the Court of Chancery, appointed five commissioners as a committee to consider and report as to methods of correcting existing abuses in Courts of Chancery. In their report they found it necessary to refer to the unfortunate existence of this form of impertinence in Chancery bills filed in the courts of the Colony. Thereafter, in the year 1820, Chancellor Kent in the case of

Hood v. *Inman,* 4 Johns Ch. (N. Y.), 437, in referring to the pleading of a power of attorney in *haec verba* in the answer, where the substance of it was accurately stated in the bill, held it to be impertinent saying "The objection to the unnecessary folia may be taken on the taxation of costs."

There can be no question that, except in the instance where the document relied upon is very brief and the exact language thereof of the very gist of the cause of action itself, the setting forth of the same in the bill *in extenso* is not only an offense against good form in pleading but such an offense as, on exception, should be held to be impertinence. There has been no substantial change in the law in American jurisdictions since Chancellor Kent spoke in the year 1820.

III.

In Substance Only

It is fundamental that the pleader must set forth in his bill all of the ultimate material facts which go to constitute his cause of action and that having done so he is required to do no more by the general rules of Chancery pleading. This situation is modified of course in jurisdictions where statutes or local rules of court provide that written instruments should be filed with the pleading. As, for instance, in Art. 16, Par. 120 of the Code of Maryland which is based upon the 4th equity rule, it is provided "that no order for process shall be made or issued upon any bill, petition or other paper until such bill, petition or other paper, together with all the exhibits referred to as parts thereof, be actually filed with the Clerk of the Court. See *Beachey* v. *Heiple,* 130 Md., 683, 101A, 553; *Henderson* v. *Harper,* 127 Md., 429, 96 A., 550; Ann, Cas. 1917 C. 93; *Peabody* v. *George's Creek Coal, Etc. Co.,* 120 Md., 659, 87A. 1097; *Nagen Gast* v. *Alz.* 93 Md., 522, 49A. 333; *Chappell* v. *Clarke,* 92 Md., 98, 48A. 36; *Baltimore* v. *Coates,* 85 Md., 531, 37 A. 18.

In Tennessee, the rule is the same except that the written documents upon which complainant's cause of action is based may be produced on order of the chancellor after the bill is filed and the bill itself is not demurrable because the same are not filed therewith. *Carter* v. *Chattanooga* (Ch. A.T. 48 S.W. 117).

There is much to be said in favor of this method of pleading because in the first place it lays no additional burden upon the pleader. Good form and safety require that he at least set forth in substance the written document relied upon in his bill even though he may thereafter attach the same as an exhibit. The only danger is one which arises from failure to completely and accurately allege all that is material.

IV.

In Substance Only With Exhibit Attached

This method for many years has been the common practice in the United States though there is little evidence that the same ever became general in England. There has been, however, some difference of opinion as to the relative weight and consideration to be given to the exhibit in comparison with that to be attached to the bill itself. Some authorities have held that the attaching of the exhibit does not dispense with the usual allegations as to the substance of the document in the pleading, while others have held that the attaching of the exhibit practically excuses the pleader from any more than formal reference to the document in the bill.

Among the courts adhering to the first view we find again several shades of opinion, where a variance occurs. Some jurisdictions hold that the allegations of the bill control, but the majority hold that in such case the provisions of the exhibit are controlling.

In *Caton* v. *Willis,* 40 N. C. 336 the Court says "Exhibits do not make a part of the bill but are a part of the proof and cannot aid defective statements in the bill any

more than any other part of the proof." While there are other similar decisions, notably in Missouri, *Pomeroy* v. *Fullerton,* 113 Mo. 440, 21 S. W. 19; *Tesson* v. *Tesson,* 11 Mo. 274 and in Texas, *Guadalupe* v. *Johnston,* 1 Tex. Civ. A 713, this is not the general rule.

There are so many statements in the decisions to the effect that an exhibit properly attached to a bill in chancery becomes a part thereof so that a defect in the allegations of the bill concerning the substance of the document exhibited will be cured by the exhibit that no attempt will be made here to quote from any decisions on this subject other than those of the State of Illinois.

In *Moore* v. *Titman,* 33 Ill. 357, the court said in reference to the contention of the appellant that the execution and delivery of the deed of mortgage relied upon was not sufficiently alleged in the bill: "The instrument is referred to as an exhibit which has the same effect as if copied at large into the bill. The court will refer to the exhibit to see if it sufficiently appears to have been so executed."

In *Brunner* v. *Equitable Life Assurance Co.,* 100 Ill. App., 22, the court said: "We are of the opinion that when a document is referred to in the bill as an exhibit and attached thereto, and the whole bill shows that complainant treats it as a part thereof, it should also be treated by the court as a part of the bill," citing Daniell's Chy Pl. and Prac. 367; *Brown* v. *Redwyne,* 16 Ga. 67; *Howard Mfg. Co.* v. *Water Lot Co.,* 53 Ga. 689.

That Illinois is one of the states whose courts regard the exhibit as controlling, rather than the allegations of the bill, concerning the document exhibited, is established by many cases. In *Benneson* v. *Savage,* 130 Ill. 352, Mr. Justice Scofield said, "It is objected that the contract described in the bill and that described in the trust deed are not the same, and that therefore the trust deed is not a security for the contract described in the bill. A copy of the trust deed is made part of the bill as an

exhibit, and it is therefore unimportant, even if it would be conceded that the pleader misconceived its legal effect, for the instrument itself being thus before us, we will give it that legal effect to which it is entitled," citing as authority *Allen* v. *Woodruff*, 96 Ill., 11. To the same effect is *National Park Bank of New York* v. *Halle*, 31 Ill. 17.

For many years cautious pleaders in this jurisdiction have insisted upon attaching as exhibits to bills filed complete and accurate copies of written documents relied upon. The objection to the practice is not that it is unsafe but that it frequently entails a large amount of mechanical work. In foreclosures of large bond issues this practice may be quite burdensome.

V.

In Substance Only With Incorporation By Apt Reference

In England after the adoption of the ordinances hereinbefore referred to, making it no longer proper or permissible to set forth written documents *in extenso* in pleadings filed in Chancery, the practice developed at an early day of setting them forth in substance, and by sufficient reference to the document itself for purposes of identification, making it in express terms a part of the pleading. 1 Daniell Ch. Br. P. 475.

As early as 1820, in *Hood* v. *Inman, supra,* Chancellor Kent referred with approval to the report of the special commissioners appearing at the end of Bradford's Edition of the Colony Laws of New York, in which it is said that it is sufficient after making a statement of the substance of certain deeds, in order that the pleader may have the benefit of said deeds, for him to conclude "as by the deeds ready to be produced will appear."

There are other later American authorities to the same effect.

In *Swetland* v. *Swetland,* 3 *Mich.* 482, the court said:

"By referring in a bill to an instrument 'as in and by said Indenture (reference being thereunto had) when produced will more fully and at large appear' the whole document referred to is made a part of the record."

They further held that though not fully nor accurately set forth in the bill complainant might at the hearing avail himself of such portions as are not recited as well as such portions as are inaccurately set forth.

The Supreme Court of Alabama, in the case of *Eskridge* v. *Brown et al.,* 208 Ala. 210 (94 So. 353) in commenting on the situation where the bill recites after describing the existence of a certain conveyance which is relied upon by the pleader: "Said conveyance is recorded in the office of the Judge of Probate of Marengo County, Alabama, in Deed Book, volume TT, page 253 *et. seq.,* and which said conveyance is hereby referred to and with leave of the court made a part of this bill of complaint, the same as though it was here set forth in full, and with leave of reference thereby as often as may be necessary," that the conveyances alleged in the bill were sufficiently averred. It is not clear in the foregoing case whether the court holds the averment of the written document to be sufficient on account of the allegations as to the substance thereof found in the bill, or because of the method of incorporation by reference thereto which is adopted by the pleader. A fair inference, however, is that some weight at least was attached to the document itself on account of its incorporation by reference.

It should be noted in this connection that the same court in *Jones* v. *Caraway,* reported in 87 So. 820, where the bill did not set forth the substance of a mortgage sought to be declared void but merely stated the book and page in which same was recorded and said, "To which reference is hereto made" held this to be wholly inadequate to make the mortgage a part of the bill.

The Supreme Court of North Carolina in *Martin* v. *McBryde,* 38 N. C. (3 Ir. Eq.) 531, said that where a

bill refers to an instrument which is relied upon without setting forth the contents thereof, or having annexed thereto a copy is bad on demurrer. In this connection it should be noted, however, that the uniform ruling of this court is that it is necessary, not only to set forth the written instrument relied upon in substance, but if the same is material to complainants' cause of action, to attach also a copy of it to the bill as an exhibit.

One of the most favorable cases from the standpoint of this practice is that of *Loewenstein* v. *Rapp,* 67 Ill. App. 678. This was a bill to foreclose a trust deed upon certain premises in Cook County, Illinois. The pleader failed to set forth in his bill any of the provisions of the trust deed having to do with the payment of the taxes by the legal holder of the notes secured thereby or the allowance of solicitors' fees in the event of foreclosure, but the trust deed, although a copy thereof was not attached to the bill, was made part of the bill by reference thereto. Mr. Justice Waterman, in delivering the opinion of the court, said: "The allegations of the bill regarding the trust deed were sufficient to make the trust deed a part of the bill. * * * In stating deeds or other written instruments in a bill, it is usual to refer to the instrument itself, in some such words as the following, namely: 'as by the said indenture, when produced, will appear'. The effect of such reference is to make the whole instrument referred to a part of the record. The effect of referring to it is to enable the plaintiff to rely upon every part of the instrument and to prevent his being precluded from availing himself at the hearing of any portion, either of its recital or operative part, which may not be inserted in the bill. Thus it seems that a plaintiff may by his bill state simply the date and general purport of any particular deed or instrument under which he claims and that such statement, provided it is accompanied by a reference to the deed itself, will be sufficient." The Supreme Court of Illinois con-

sidered this practice in *Jocelyn* v. *White,* 201 Ill. 16. The bill sought to foreclose a principal note secured by trust deed conveying real property. An attempt was made to set forth the instruments sued upon in substance only and to incorporate them by reference without attaching copies thereof to the bill as exhibits. The pleader failed, however, to properly set forth the substance of the trust deed. A demurrer to the bill on the ground that it did not state facts sufficient to constitute a cause of action was overuled by the trial court. The cause was then brought by writ of error to the Appellate Court which affirmed the decree of the Circuit Court in *Jocelyn* v. *White* 98 Ill. App. 50. The errors relied upon by these defendants when the case was brought to the Supreme Court are in part as follows: "(a) that copies of the notes and mortgage sued on were not attached to the bill or set out in *haec verba* in the bill; (b).....; (c) that there is on allegation in the bill of any condition in the mortgage or notes authorizing the holder of the notes to accelerate the maturity of the indebtedness by declaring the same due before maturity;....." After some discussion of the practice in this respect in the state of Illinois and elsewhere the court said, in part, "..... we understand the rule to be, that if the complainant in the bill relies upon a written instrument, and has so described the instrument as to identify it, and then by apt words specifically refers to the instrument, he may, if demurrer be not interposed, upon the trial of the cause have the benefit of the instrument and all its provisions, but that if the bill, on its face and in apt terms, does not contain all the allegations necessary to show him to be entitled to the relief prayed, the bill will be obnoxious to demurrer, but if the bill be not demurred to, but be answered or default made, and the instrument so referred to, when offered in evidence, shows the right of the plaintiff to his relief, then in such case the bill will be sufficient to support the decree." Upon this and other grounds the Su-

preme Court reversed the judgment of the Appellate Court and the decree of the Circuit Court and remanded the cause to the Circuit Court of Cook County for further proceedings in conformity with the opinion.

It cannot be contended in view of the foregoing decision of the Supreme Court of Illinois, that such a practice would insure to the pleader all of the benefits which might accrue to him in the event that he had attached the document relied upon to his bill as an exhibit. On the other hand, however, it does not appear from the authorities that the practice of incorporating the written instrument by reference only, after seting forth the substance thereof in the bill itself, is improper or is not as beneficial to the pleader as the more cumbersome method. The authorities in other states holding that such a practice is improper, or that exhibits must be attached to the bill, are for the most part based upon local statutes or rules of court which modify the original chancery practice. There can be no doubt that if the substance of the written instrument is properly pleaded in the bill there can be no necessity in this state of attaching exhibits. It seems therefore a reasonable conclusion that where the bill contains sufficient allegations as to the substance, and where the documents relied upon are of such length that their incorporation as exhibits would be onerous, distinct advantage might be attained by making them a part of the bill by apt reference thereto without attaching copies as exhibits.